UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

APRIL GREENWOOD-DAVENPORT, Plaintiff, vs. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	No. 1:15-CV-3113-FVS REPORT AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 12, 14

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 12, 14. This matter has been referred to the undersigned magistrate judge for issuance of a report and recommendation. ECF No. 16. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, IT IS RECOMMENDED Plaintiff's Motion (ECF No. 12) be denied and Defendant's Motion (ECF No. 14) be granted.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an

ALJ's decision on account of an error that is harmless." *Id*. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id*. at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(b).

If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(c).

At step three, the Commissioner compares the claimant's impairment to severe impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. § 416.920(d).

If the severity of the claimant's impairment does not meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess the claimant's "residual functional capacity." Residual functional capacity (RFC), defined generally as the claimant's ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

capable of performing other work; and (2) such work "exists in significant numbers in the national economy." 20 C.F.R. § 416.920(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ'S FINDINGS

Plaintiff applied for Title XVI supplemental security income on January 20, 2012. Tr. 173, 186. Plaintiff alleged disability beginning August 1, 2010. Tr. 173, 186. The application was denied initially, Tr. 107, and on reconsideration, Tr. 119. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on November 12, 2013. Tr. 37-75. On February 10, 2014, the ALJ denied Plaintiff's claim. Tr. 21-30.

At step one of the sequential evaluation analysis, the ALJ found Plaintiff has not engaged in substantial gainful activity since January 20, 2012, the application date. Tr. 23. At step two, the ALJ found Plaintiff has the following severe impairments: lumbar degenerative disc disease; obesity; depression; somatoform disorder. Tr. 23. At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 23-24. The ALJ found Plaintiff not entirely credible and determined:

> [C]laimant has the residual functional capacity to perform light work as defined in 20 CFR 404.967(b) except: She can occasionally lift 20 pounds and frequently lift 10 pounds; she can stand and/or walk for about 6 hours in an 8 hour workday with normal breaks; can sit for

> about 6 hours in an 8 hour workday with normal breaks; can occasionally climb ramps and stairs, as well as ladders, ropes and scaffolds; she can frequently balance; can occasionally stoop, crouch, kneel and crawl; must avoid concentrated exposure to extreme cold, vibration, as well as hazards such as moving machinery and heights; she can perform repetitive tasks in a stable work environment.

Tr. 25-27.

At step four, the ALJ found Plaintiff is unable to perform past relevant work. Tr. 28. At step five, after considering the testimony of a vocational expert, the ALJ found there are jobs that exist in significant numbers in the national economy that Plaintiff can perform. Tr. 29. Thus, the ALJ concluded Plaintiff has not been under a disability since January 20, 2012, the date the application was filed. Tr. 30.

On May 6, 2015, the Appeals Council denied review of the ALJ's decision, Tr. 2-8, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her supplemental security income under Title XVI of the Social Security Act. Plaintiff raises the following three issues for review:

1. Whether the ALJ properly weighed the medical opinion evidence;
2. Whether the ALJ properly determined Plaintiff does not meet a listing; and

3. Whether the ALJ properly discredited Plaintiff's symptom claims.

ECF No. 12 at 6-20.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ improperly discounted the medical opinion of Dr. Bellum and his findings regarding fibromyalgia. ECF No. 12 at 7-10.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant's file (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Id.* "In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists." *Id.* (citations omitted).

If a treating or examining physician's opinion is uncontradicted, an ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

"However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (internal quotation marks and brackets omitted). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

Dr. Bellum was Plaintiff's primary care provider and saw Plaintiff intermittently through May 2012 for various conditions. Tr. 260, 269, 282, 283, 285, 287, 315, 491. In February 2012, Dr. Bellum wrote a letter stating that Plaintiff was diagnosed with depression/anxiety and chronic lumbalgia. Tr. 254. He indicated that she was suffering from worsening depression and a recent fall which had exacerbated her back pain. Tr. 254. Dr. Bellum opined that Plaintiff was "unable to be gainfully employed due to [] psychiatric and medical problems." Tr. 254. He indicated that she was taking increased doses of medication and needed counseling on a regular basis. Tr. 254. In addition, Dr. Bellum stated, "I understand that she is unable to keep a steady job at this time and also unable to participate in work source." Tr. 254.

Dr. Bellum also completed two "DSHS Documentation Request for Medical/Disability Condition" forms on April 5 and April 11, 2012. Tr. 554, 556, 558, 560. On both forms, Dr. Bellum reported a diagnosis of chronic lumbalgia and indicated that Plaintiff could perform sedentary work. Tr. 554, 558. On the April 5 form, Dr. Bellum opined that Plaintiff could work or look for work for one to ten hours per week. Tr. 554. On the April 11 form, Dr. Bellum opined that Plaintiff was unable to participate in work or look for work. Tr. 558.

1. February 2012 Opinion Letter

The ALJ gave "little to no weight" to Dr. Bellum's February 2012 opinion letter. Tr. 28. Because Dr. Bellum's opinion was contradicted, *see* Tr. 99-101 (noting Dr. Bellum's opinion is more extreme than the evidence indicates and finding less restrictive limitations), the ALJ need only to have given specific and legitimate reasoning supported by substantial evidence to reject it. *Bayliss*, 427 F.3d at 1216.

First, the ALJ rejected the opinion letter because it is unsupported by the record. Tr. 28. An ALJ may discredit treating physician opinions that are unsupported by the record as a whole or by objective medical findings. *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ discussed evidence reasonably found to be inconsistent with Plaintiff's allegations and Dr. Bellum's opinion that she is "unable to be gainfully employed" and

"unable to keep a steady job" due to physical and mental impairments Tr. 26-27. For example, the ALJ noted imaging records of Plaintiff's spine did not show any nerve-root impingement (Tr. 325) and only mild to moderate degenerative disk changes without significant canal stenosis (Tr. 574). Tr. 26-27. The ALJ observed Plaintiff did not experience radicular pain (Tr. 520) and had full strength in upper and lower extremities (Tr. 357). Tr. 26-27. Regarding her mental health impairments, the ALJ noted evidence that, for example, Plaintiff had good insight and her concentration and memory were intact. Tr. 27, 336, 356. She was also described as alert, oriented, well-groomed, and cooperative. Tr. 27, 264, 488. This evidence is consistent with the ALJ's conclusion that the evidence does not support Dr. Bellum's statement that Plaintiff cannot work. Thus, this is a specific, legitimate reason supported by substantial evidence for assigning little weight to the opinion letter.

Second, the ALJ rejected the opinion letter because it infringes on an issue reserved to the Commissioner. Tr. 28. A medical source opinion that a claimant is "disabled" or "unable to work" is not a medical opinion and does not mean the ALJ will determine the claimant is disabled. 20 C.F.R. § 416.927(d)(1). The determination of disability is an issue reserved to the Commissioner. S.S.R. 96-5p. An ALJ will not give any special significance to an opinion that a claimant is disabled or unable to work. 20 C.F.R. § 416.927(d)(3). Dr. Bellum's letter states

Plaintiff is unable to work and the ALJ reasonably determined the letter opinion addresses an issue reserved to the Commissioner. Furthermore, the letter mentions no functional limitations and therefore provides little assistance in assessing Plaintiff's limitations for purposes of the RFC. Thus, this is a specific, legitimate reason for rejecting the opinion.

2. DSHS Form Opinions

The ALJ also reviewed the DSHS forms completed by Dr. Bellum but mistakenly attributed them to Vicki Mills, WPS.[1] Tr. 28. The ALJ gave little weight to the DSHS forms. Tr. 28.

First, the ALJ rejected the opinions because the medical credentials of the author were unclear. Tr. 28. Defendant acknowledges the ALJ erred, since the DSHS forms were actually completed by Plaintiff's treating physician, Dr. Bellum. ECF No. 14 at 13. However, Defendant argues the error is harmless since the ALJ gave other specific, legitimate reasons supported by substantial evidence for rejecting the opinions. ECF No. 14 at 13. Plaintiff cites *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006) and asserts, "Once an ALJ commits legal error that particular ALJ who decided the case is not due deference,

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[1] Vicki Mills is a Work First employee who requested the medical opinions from Dr. Bellum. Tr. 554, 558.

but the test becomes can the Court confidently conclude that no reasonable ALJ would have reached a different conclusion, not whether this ALJ might have reached the same conclusion." ECF No. 15 at 2.

However, in *Stout*, the ALJ failed to provide *any* reasons for rejecting a lay witness statement and consequently there was no basis to determine whether the ALJ's decision was adequately supported. 454 F.3d at 1054-55. The relevant inquiry is whether the ALJ's decision remains legally valid, despite the error. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). Where one of an ALJ's reasons for rejecting a medical opinion is based on error, if other specific, legitimate reasons supported by substantial evidence were also provided, the error is harmless. *Molina*, 674 F.3d at 112 n.4 (ALJ's possible error regarding the source of an opinion was harmless when ALJ gave specific, legitimate reasons supported by substantial evidence for rejecting the opinion). Because the ALJ in this case cited other valid, specific, legitimate reasons supported by substantial evidence for rejecting Dr. Bellum's opinion, the error in attributing the opinion to the incorrect source is harmless.[2]

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[2] Without citing any authority, Plaintiff asserts, "It is not proper to say the ALJ gave reasons to reject other opinions from Dr. Bellum, therefore, this ALJ if she had realized this opinion was from Dr. Bellum would have rejected them for the

Second, the ALJ rejected Dr. Bellum's opinions because they were given in boilerplate forms with no residual functional capacity assessment. Tr. 28. An ALJ may reject check-box reports that do not contain any explanation of the bases for their conclusions. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). On the April 5 form, Dr. Bellum did not complete all of the questions and provided no explanatory information. Tr. 554. On the April 11 form, Dr. Bellum did not explain his opinion, despite being asked to describe any specific limitations identified and how they affected Plaintiff's ability to work or look for work. Tr. 558. The ALJ reasonably concluded the form opinions are entitled to less weight. This is a specific, legitimate reasons for rejecting the opinions.

Plaintiff argues that the opinions contained in the forms were supported by Dr. Bellum's chart notes. ECF No. 12 at 13. However, Plaintiff fails to identify any chart notes specifically supporting Dr. Bellum's conclusions that Plaintiff cannot work or can work at the sedentary level on a very limited basis. By

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same reasons." ECF No. 15 at 3. Plaintiff argues additional weight would or could be due the opinion by a reasonable ALJ if the ALJ realized the DSHS form opinions were also generated by Dr. Bellum. ECF No. 15 at 3-4. Regardless, the outcome of the case would not be different because the three remaining reasons cited by the ALJ for rejecting the opinions are valid.

contrast, the ALJ identified numerous records supporting the determination that Dr. Bellum's conclusions are not supported by the record. *See supra*.

Plaintiff also argues the ALJ "inconsistently" gave significant weight to the opinion of the state reviewing physician, Dr. Staley, whose opinion was also reported on a form. ECF No. 12 at 13; Tr. 27, 101-03. However, as noted by Defendant, Dr. Staley's opinion contains specific findings regarding limitations and contains explanations for each finding. ECF No. 14 at 14. Dr. Staley indicated that his findings are based on Plaintiff's degenerative disk disease, chronic back pain, and fibromyalgia-type pain. Tr. 100. He noted evidence of normal movements and full strength, but assessed limitations due to pain complaints. Tr. 100. Dr. Staley also noted the environmental limitations assessed were due to Plaintiff's past surgery. Tr. 100. Although Dr. Staley's findings are economically worded, they explain the basis for his conclusions. Furthermore, the ALJ identified other substantial evidence in the record consistent with Dr. Staley's findings. Tr. 27; *see Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (opinion of a nonexamining physician may serve as substantial evidence if it is supported by and consistent with other evidence in the record). Thus, the ALJ did not err by relying on Dr. Staley's opinion over Dr. Bellum's.

Third, the ALJ rejected the DSHS form opinions because they were contracted by the longitudinal record. Tr. 28. The consistency of a medical

opinion with the record as a whole is a relevant factor in evaluating the opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). As discussed *supra*, the ALJ noted numerous records inconsistent with the severe limitations on Plaintiff's ability to work and look for work opined by Dr. Bellum in the DSHS forms. This is therefore a specific, legitimate reason supported by the evidence for rejecting the opinions.

Fourth, the ALJ rejected Dr. Bellum's DSHS form opinions because they were contracted by Plaintiff's daily functioning. Tr. 28. An ALJ may discount a medical source opinion to the extent it conflicts with the claimant's daily activities. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 601-602 (9th Cir. 1999). The ALJ noted evidence Plaintiff regularly collects scrap metal with her husband, gardens, goes on trips to the mountains, fishes, plays sports with her children, cleans, rides a bicycle, walks three or more miles a day four or five times per week, and other similar activities. Tr. 27, 50-51, 53-55, 59-62365, 505, 609. Socially, she attends her children's sporting events and school functions. Tr. 27, 334. She reported she tripped on her stairs while running back and forth between her outdoor garden and baking cupcakes inside. Tr. 27, 566. The ALJ reasonably concluded that these activities are inconsistent with Dr. Bellum's opinion that Plaintiff cannot participate in work or look for work for more than one to ten hours

per week. This is therefore another specific, legitimate reason supported by substantial evidence which justifies rejecting Dr. Bellum's DSHS form opinions.

3. Fibromyalgia

Plaintiff contends the ALJ misinterpreted evidence about fibromyalgia which should have been given more weight. ECF No. 12 at 7-10.

The ALJ asserted Dr. Bellum found 18/18 positive fibromyalgia tender points on examination in June 2011. Tr. 28. The ALJ observed that without diagnosing fibromyalgia, the doctor sent Plaintiff for EMG testing, which was unremarkable. Tr. 28. Accordingly, the ALJ assigned little weight to the fibromyalgia findings after also considering the objective evidence and Plaintiff's activities of daily living. Tr. 28. Plaintiff argues the ALJ misinterpreted the evidence, misunderstands the process of diagnosing fibromyalgia, and committed "obvious error." ECF No. 12 at 7-8.

However, both Plaintiff and the ALJ misattributed the "fibromyalgia evidence" to Dr. Bellum when in fact 18-point testing was done by Dr. Marsh at Water's Edge Pain Center. Tr. 28, 357, 445; ECF No. 12 at 7-10. The only records from Dr. Marsh in the record are exam notes from June and July 2011 which include findings of 18/18 positive fibromyalgia tender points. Tr. 357, 445. The June 2011 notes also mention "treatment considerations" of possible Effexor or Cymbalta to help with sleep, and "which can also be helpful for fibromyalgia."

Tr. 358. Despite exam findings of positive fibromyalgia tender points, Dr. Marsh did not list fibromyalgia as a diagnosis in the "assessment" portion of his report, consistent with the ALJ's finding. Tr. 28, 357. Vern Commet, ARNP, noted in March 2012 that he reviewed Dr. Marsh's nerve studies and indicated Dr. Marsh opined "he felt the patient probably has some component of fibromyalgia." Tr. 518. However, this conclusion does not appear to be contained in the nerve conduction study results or other notes from Dr. Marsh in the record. Tr. 354-58, 445-49. Thus, it is not apparent from the record that Dr. Marsh diagnosed or treated Plaintiff for fibromyalgia. Further, Mr. Commet noted that Plaintiff's "main complaint really is her low back and leg at this point."[3] Tr. 518.

Notwithstanding, even if a fibromyalgia diagnosis was established and credited as part of the evidence, Plaintiff has not identified any limitations attributable to fibromyalgia which are not accounted for in the residual functional capacity finding. The RFC is "the most [a claimant] can still do despite his limitations." 20 C.F.R. § 416.945(a)(1). In making this finding, the ALJ need only include credible limitations supported by substantial evidence. *Batson*, 359 F.3d at

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[3] Subsequent records from Mr. Commet appear to adopt fibromyalgia as a diagnosis. Tr. 594, 596, 598, 603-05. Jennifer Martin, PA-C, also mentioned "suspected" fibromyalgia and referred Plaintiff to a rheumatologist. Tr. 566, 571.

1197 (holding that ALJ is not required to incorporate evidence from discounted medical opinions into the RFC). Indeed, the ALJ gave significant weight to Dr. Staley's opinion, and his assessment of limitations took into account Plaintiff's complaints of fibromyalgia-like pain. Tr. 100. Plaintiff points to no additional limitations due to alleged fibromyalgia which are supported by the record. Thus, even if the ALJ erred regarding the fibromyalgia diagnosis, the error is harmless because the RFC finding would not be changed. Errors that do not affect the ultimate result are harmless. *See Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984).

B. Step Three – Listing 1.04

Plaintiff next contends the ALJ erred at step three by finding that Plaintiff does not meet Listing 1.04 for disorders of the spine. ECF No. 12 at 14-16.

The Listing of Impairments[4] "describes each of the major body systems impairments [which are considered] severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education or work experience." 20 C.F.R. § 416.925. To meet a listed impairment, a claimant must establish that she meets each characteristic of the listed impairment relevant to her

[4] The Listing of Impairments is in Appendix 1 to 20 C.F.R. Subpart 404.

claim. 20 C.F.R. § 416.925(d). If a claimant meets the listed criteria for disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii). The claimant bears the burden of establishing she meets or equals a listing. *Burch v. Barnhart*, 400 F.3d 676, 683 (2005).

Listing 1.04, "Disorders of the Spine," provides the Listing is met when the spinal condition results in compromise of a nerve root or the spinal cord *and* there is:

> A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);
> or
> B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours;
> or
> C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

The ALJ found Listing 1.04 is not met or equaled because the medical evidence does not establish the required evidence of nerve root compression, spinal arachnoiditis (pain disorder), or lumbar spinal stenosis (degenerative spinal

disease). Tr. 24. The ALJ also found there is no evidence of the inability to ambulate effectively to establish lumbar spinal stenosis under Listing 1.00B2b, which defines the inability to ambulate.

Plaintiff contends "contrary to the ALJ's finding that [Plaintiff] does not have spinal stenosis, she has had repeated diagnoses of lumbar spinal stenosis/degenerative spinal disease." ECF No. 12 at 15-16. The ALJ did not find that Plaintiff does not have spinal stenosis. In fact, the ALJ found Plaintiff's lumbar degenerative disc disease is a severe impairment. Tr. 23. However, the ALJ also found her lumbar disease does not meet the Listing 1.04 criteria for a finding of disability.

Plaintiff has not met her burden of establishing that she in fact does meet the Listing criteria. A generalized assertion of functional problems is not enough to establish disability at step three. *Tackett*, 180 F.3d at 1100. For a claimant to show that his impairment matches a listing, it must meet all of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify. *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990). Despite many citations to the record reflecting a back impairment, Plaintiff fails to demonstrate how the required elements of Listing 1.04 are met by the evidence. ECF No. 12 at 14.

Plaintiff also contends the ALJ erred by not considering Plaintiff's spinal impairment in combination with her other severe impairments of obesity and depression. ECF No. 12 at 14. The ALJ considered both obesity and depression in detail, despite Plaintiff's assertion to the contrary. Tr. 24, ECF No. 12 at 14. In *Burch*, the district court aptly explained, as in this case:

> There was no evidence before the ALJ, and none in the record, which states that claimant's obesity limits her functioning. Neither treatment notes nor any diagnoses addressed claimant's limitations due to obesity. The medical record is silent as to whether and how claimant's obesity might have exacerbated her condition. Moreover, claimant did not present any testimony or other evidence at her hearing that her obesity impaired her ability to work.

Burch, 400 F.3d at 683. Furthermore, the *Burch* court concluded the ALJ did not commit reversible error by failing to consider obesity in determining whether the claimant met or equaled a listed impairment. *Id.* Unlike the ALJ in *Burch*, in the case at hand, the ALJ did, in fact, consider the effects of obesity and depression. Tr. 24-25. Plaintiff has pointed to no evidence that those conditions exacerbate Plaintiff's limitations to the point that Listing 1.04 is met or equaled. Thus, the step three finding is supported by substantial evidence and is legally sufficient.

C. Adverse Credibility Finding

Plaintiff faults the ALJ for failing to provide specific findings with clear and convincing reasons for discrediting her symptom claims. Specifically, Plaintiff

contends the ALJ's credibility finding is based on error because the ALJ mischaracterized her daily activities. ECF No. 12 at 16-20.

An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id*. (quoting *Lester*, 81 F.3d at 834); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make a credibility determination with findings sufficiently specific to permit the court to

conclude that the ALJ did not arbitrarily discredit claimant's testimony."). "The clear and convincing [evidence] standard is the most demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

In making an adverse credibility determination, the ALJ may consider, *inter alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the claimant's testimony or between her testimony and her conduct; (3) the claimant's daily living activities; (4) the claimant's work record; and (5) testimony from physicians or third parties concerning the nature, severity, and effect of the claimant's condition. *Thomas*, 278 F.3d at 958-59.

This Court finds that the ALJ provided specific, clear, and convincing reasons for finding Plaintiff's statements concerning the intensity, persistence, and limiting effects of those symptoms not credible. Tr. 26-27.

1. Medical Evidence

First, the ALJ found the medical evidence does not support Plaintiff's allegations. Tr. 26. An ALJ may not discredit a claimant's pain testimony and deny benefits solely because the degree of pain alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). However, the medical evidence is a relevant

factor in determining the severity of a claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §416.929(c)(2); *see also* S.S.R. 96-7p.[5] Minimal objective evidence is a factor which may be relied upon in discrediting a claimant's testimony, although it may not be the only factor. *See Burch*, 400 F.3d at 680. As discussed *supra*, the ALJ cited substantial evidence supporting the conclusion that the medical evidence does not support the degree of limitation alleged. Tr. 26-27. As a result, this is clear and convincing reason supported by substantial evidence which justifies the negative credibility finding.

2. Inconsistencies and Daily Activities

Second, the ALJ cited inconsistencies between Plaintiff's claims and the evidence in the record. Tr. 27. In making a credibility evaluation, the ALJ may rely on ordinary techniques of credibility evaluation. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). Furthermore, it is reasonable for an ALJ to consider a claimant's activities which undermine claims of totally disabling pain in making

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[5] S.S.R. 96-7p was superseded by S.S.R. 16-3p effective March 16, 2016. The new ruling also provides that the consistency of a claimant's statements with objective medical evidence and other evidence is a factor in evaluating a claimant's symptoms. S.S.R. 16-3p at *6. Nonetheless, S.S.R. 16-3p was not effective at the time of the ALJ's decision and therefore does not apply in this case.

the credibility determination. *See Rollins*, 261 F.3d at 857. Notwithstanding, it is well-established that a claimant need not "vegetate in a dark room" in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987). However, if a claimant is able to spend a substantial part of her day engaged in pursuits involving the performance of physical functions that are transferable to a work setting, a specific finding as to this fact may be sufficient to discredit an allegation of disabling excess pain. *Fair*, 885 F.2d at 603.

The ALJ observed that despite allegations of constant, severe pain that occasionally prevent her from getting out of bed, she reported activities such as collecting scrap metal, gardening, trips to the mountains, fishing, playing sports with her children, cleaning, riding her bicycling, and walking several miles at a time. Tr. 27, 49-51, 53-55, 59-62, 365, 505, 600, 609. The ALJ reasonably concluded these are not the type of activities that a person reporting constant, severe pain would be expected to engage in.

The ALJ also noted that despite claims that her life is unbalanced and implying that she has difficulties with social function, Plaintiff attends her children's sporting events, family functions at school, and has close contact with several family members for support. Tr. 27, 334. She attended a steel-tip dart tournament. Tr. 24-25, 45-46, 60-61. The ALJ found her claims of difficulty with concentration inconsistent with participation in activities like scrapbooking, taking

pictures, maintaining a journal, attending school, gardening, and cooking. Tr. 27, 53-54, 59, 334-35. Additionally, the ALJ found it significant that Plaintiff described an incident of tripping on the stairs when she was running back and forth between her garden and kitchen. Tr. 27, 53-55, 566. The ALJ concluded such activity is inconsistent with disability. Tr. 27. The evidence cited by the ALJ reasonably supports the finding that Plaintiff's activity level is inconsistent with her claimed limitations. Thus, this is a clear and convincing reason supporting the credibility finding.

Plaintiff argues the ALJ misinterpreted her activities and cites her testimony that the time spent collecting scrap metal amounts to less than 10 hours per week. ECF No. 12 at 16-17; Tr. 51. However, the ALJ cited Plaintiff's testimony about collecting scrap metal to illustrate that she is more active than would reasonably be expected of someone who is in constant severe pain and cannot get out of bed some days, not to suggest she is engaged in substantial gainful activity or could perform that particular activity as full-time work. Similarly, Plaintiff contends the ALJ should not have considered Plaintiff's online schoolwork because it "was from 2011 which was prior to her starting her claim for SSI." ECF No. 12 at 17. However, her alleged onset date of August 1, 2010, indicates Plaintiff claimed to be disabled during a period in which she was able to attend school. Tr. 173, 186, 334. This reasonably supports the ALJ's conclusion that Plaintiff's statements

about her disability and her activities are inconsistent. Plaintiff also asserts that she dropped out of school due to her disabilities. ECF No. 12 at 17; Tr. 42-43. Even if the ALJ should not have considered college activity, it was just one factor in the overall finding that Plaintiff's activities are inconsistent with her statements.

Lastly, Plaintiff contends the ALJ mischaracterized the extent and duration of her activities. Plaintiff suggests that *Garrison*, 759 F.3d at 1016, indicates daily activities must actually be inconsistent with disability before they become relevant. The Court concludes it was reasonable for the ALJ find exactly that: activities such as collecting scrap metal, gardening, bicycling, walking significant distances, and others discussed by the ALJ are inconsistent with Plaintiff's allegations of disability. Plaintiff's activities are distinguishable from the activities discussed in *Garrison* such as talking on the phone, cleaning a bedroom, preparing meals, and caring for a child, all with significant assistance. *Id.* Plaintiff's activities are more like those in cases cited by Defendant, such as *Berry v. Astrue*, 622 F.3d 1228, 1234-35 (9th Cir. 2010) (activities inconsistent with disability included daily walks of a mile or more, social engagements, driving, crossword puzzles, computer work, pet care, house-keeping, camping, and hiking), and *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009) (ALJ reasonably found exercise, gardening and community activities inconsistent with disability).

Thus, the ALJ's finding regarding the inconsistency of Plaintiff's daily activities with her allegations is supported by the evidence. The Court concludes the ALJ's interpretation of the evidence is reasonable, and this is a clear and convincing reason supporting the credibility determination.

CONCLUSION

Having reviewed the record and the ALJ's findings, this Court concludes the ALJ's decision is supported by substantial evidence and free of harmful legal error.

Accordingly, **IT IS HEREBY RECOMMENDED**:

1. Plaintiff's Motion for Summary Judgment, ECF No. 12, be DENIED.

2. Defendant's Motion for Summary Judgment, ECF No. 14, be GRANTED.

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after receipt of the objection. Attention is directed to FED. R. CIV. P. 6(d), which adds additional time after certain kinds of service.

A district judge will make a *de novo* determination of those portions to which objection is made and may accept, reject or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to enter this Report and Recommendation, forward a copy to Plaintiff and counsel, and **SET A CASE MANAGEMENT DEADLINE ACCORDINGLY.**

DATED August 22, 2016.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE